No. 75-464

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

EMSLIE LEANDER MOORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
No. _____

EMSLIE LEANDER MOORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit

The Petitioner, Emslie Leander Moore respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this cause on June 19, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, and the denial of peti-

tion for rehearing appear in reproduced form in Appendix "A" and Appendix "B" respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 19, 1975 and the denial of petitioner's request for a rehearing was filed on August 25, 1975. This petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the violations of petitioner's constitutional right, in respect to the Fourth and Sixth Amendments to the United States Constitution, were properly adjudicated by the Court of Appeals for the Ninth Circuit:

A. Do the opinions of this Court in Aguilar v. Texas, 378 U.S. 108, and Spinelli v.

United States, 393 U.S. 410, still require an affiant, seeking a search warrant, to support conclusions in his affidavit with reliable information from credible sources?

B. Will this Court now take a position and resolve the existing conflict among the Circuits, regarding a defendant's Sixth Amendment rights to the effective assistance of counsel and confrontation of his accusers as it applies to the examination of witnesses and in-camera hearings?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right to. . . be confronted with the witnesses against him; . . . . and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On March 9, 1973 several agents of the F.B.I. searched the premises and residence at 11517 Posthill Place, Lakeside, California, and also searched a green Ford van located on the premises. These searches were pursuant to two search warrants, one for the residence and one for the van.

Both of the warrants were supported by the identical affidavit (C.T.[1] 260-263, 270-273, copy attached herewith as Appendix "C") of F.B.I. Agent Alfred A. Reginato.

These agents seized numerous tools as a result of the search, and the tools were used as evidence at trial, in which

[1] C.T. indicates page number of Clerk's Transcript on Appeal.

Emslie Leander Moore was convicted of conspiracy to conceal government property, Title 18 United States Code, Section 371, and concealing government property, Title 18 United States Code, Section 641 (C.T. 294 and R.T.[2] 13 of Transcript of June 21, 1974, "Further Court Trial").

Prior to trial (C.T. 22) and at trial (R.T. 14, Court Trial, June 18, 1974), defendant Emslie Leander Moore sought to have the evidence suppressed, and to seek a hearing to attack certain obvious misrepresentations in the affidavit (Appendix "C"), and other misrepresentations in the affidavit, by examining a specific defense witness, Glen Wachhold (R.T. 84, Court Trial, June 18, 1974). However, defendant, through counsel, was precluded from examining his witness (R.T. 80, 81 Court Trial, June 18, 1974; R.T. 9, 10 Court Trial, June 21, 1975) because, although possibly relevant, it would tend to reveal the identity of the informant

[2] R.T. indicates page number of Reporter's Transcript of specific trial date.

and would only go to the issue of probable cause.

Counsel for defendant, at trial, introduced his affidavit as to conversations had with Glen Wachhold. Said affidavit, filed as a Court exhibit (R.T. 5, Court Trial, June 21, 1974), indicated that Mr. Wachhold was a person the defendant believed to be the informant and by process of elimination, a further offer of proof (R.T. 7, 8, Court Trial, June 21, 1974 accepted by the Court, R.T. 136, Sentence and Motion for New Trial) indicated Wachhold was the only person referred to in Agent Reginato's affidavit (Appendix "C").

The significance here, is, counsel's affidavit shows that Wachhold told a different story to counsel than the story attributed to the informant.

Original federal jurisdiction in this cause was based on the theft of United States Government property from a military installation in the Southern District of California.

REASONS FOR GRANTING THE WRIT

1A. The Court of Appeals for the Ninth Circuit improperly applied the dictates of this Court's rulings in Aguilar v. Texas, 378 U.S. 108 and Spinelli v. United States, 393 U.S. 410.

It is obvious in reading Agent Reginato's affidavit (Appendix "C") that he does not refer, at any time, from whom he received any of the information contained in the affidavit. It is additionally obvious that many of the paragraphs, even if it were known from whom the information was received have no supportive underlying circumstances.

The usual situation in an affiant's statement is that he relates who told him what it is he is stating if he does not have personal knowledge.

In Reginato's affidavit the statement that a confidential source had provided reliable information in the past completely fails the test set for in Aguilar, supra, because it is a statement by an

affiant with no personal knowledge that the confidential source ever furnished any information in the past. Had he known anything about the confidential source he surely would not have made two different references in his affidavit (see paragraphs 1 and 9, Appendix "C") as to the prior reliability.

The face of the affidavit is therefore without sufficient information to support any of the conclusionary statements made by Reginato. All Reginato has submitted in his affidavit is that he has sworn, deposes and states, to the 13 paragraphs contained in it without once asserting how or where he received the information or his belief that the information is reliable.

1B. <u>The refusal of the Trial Court to allow defense counsel to examine his own witness, and to deny the defendant a hearing in challenge to the affidavit supporting the search warrant, is contrary to the Sixth Amendment to the Constitution by denying the defendant the ef-</u>

<u>fective assistance of counsel and denying him his right to confront his accusers</u>.

The Trial Court erred in its denial to allow defendant a hearing to challenge the affidavit pursuant to <u>United States v. Dunnings</u>, 425 F.2d 836 (2nd Cir. 1969).

The differences of opinion among the Circuit Courts of Appeal as to when and to what extent a defendant may challenge the accuracy of an affidavit, now requires this Court to set the standards to be followed to insure fairness in application of the law.

The Second, Fifth, Seventh, Eighth, Ninth and Tenth Circuits of the United States Court of Appeals all have ruled as to the propriety of a defendant being allowed a hearing to challenge false statements in affidavits used to support search warrants.

The Courts are concerned with the possibility of perjury being committed by the police officers and have thus generally approved a hearing when he can show: (1) any misrepresentation by the govern-

ment agent of a material fact, or (2) an intentional misrepresentation by a government agent whether or not material (United States v. Carmichael, 489 F.2d 983, 988, 7th Cir. 1973).

In Carmichael, supra, at 988, the Court comments that this Court has not yet decided the extent to which a court may permit such a hearing.

The Fifth Circuit also commented about the Supreme Court not making such a determination. In United States v. Upshaw, 448 F.2d 1218, 1221 note 3, the Court stated:

> While the Supreme Court has discussed extensively the requirements which an affidavit must meet to establish probable cause, it has not determined the extent of the defendant's right to test the accuracy of its allegations.

In Upshaw, supra, an F.B.I. agent, as an affiant, made outright lies and admitted so under examination. The Court struck the erroneous portions and the warrant then failed.

Again in the Fifth Circuit in the case of United States v. Jones, 475 F.2d

723 (1973) an agent lied as to critical matters relating to probable cause and the Court set aside the warrant.

In United States v. Pearce, 275 F.2d 318, a Seventh Circuit case, not too different from the present cause except Agent Stoelting, the affiant in Pearce said he had received the information from a certain person when he in fact had not. In the present cause, Agent Reginato did not indicate how the information in the affidavit came to his attention. See also, United States v. Roth, 391 F.2d 507 (7th Cir. 1967) and United States v. Edge, 444 F.2d 1372 (7th Cir. 1971).

Not only the Courts of the Circuit, but commentators also believe the necessity of this Court to adopt some uniform standards.

"If the Fourth Amendment is to provide a durable and uniform standard to govern search and seizure throughout the country, then an orderly set of rules must apply to the entire range of challenges to the validity of search warrant affidavits. . . . Reviewing the validity of the affiant's allegations

seems even more justifiable than reviewing their sufficiency since the warrant is issued in an ex parte hearing where the magistrate's only check on the affiant's veracity is a search for internal inconsistency in his statement." (Kipperman, Inaccurate Search Warrant Affidavits As a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825, 830 1971).

The Tenth Circuit in United States v. Harwood, 470 F.2d 322 (1970), and the Second Circuit, in United States v. Botsch, 364 F.2d 542 (1966) have also approved of challenging false statements in search warrant affidavits.

The Ninth Circuit alone has imposed the strictest conditions on a party seeking to challenge the truthfulness of an affidavit. In United States v. Bolton, 458 F.2d 377, 378 n.6 the Court requires a "substantial" showing as opposed to the "any" showing requirements in the other circuits.

In this cause the "any misrepresentations or other impositions" on the magistrate are that the magistrate was made to believe two reliable informants were fur-

nishing information (see paragraphs 1 and 9 Appendix "C") and the obviousness of Wachhold being the informant further showed the falsehoods because he advised counsel of information different than that contained in the affidavit. If he testified differently in the in-camera hearing with the trial judge (RT. 9, June 21, 1974 Court Trial) it is only indicative of additional lies.

The defendant, Emslie Leander Moore, made a showing sufficient for a hearing. Although the Court indicated it would not grant a hearing, the Court in fact held a hearing, in-camera, based on the showing made. To properly protect the rights of Mr. Moore and to insure a fair trial the least the Court could have done was to allow counsel to participate in the hearing as proposed in United States v. Anderson, 509 F.2d 724 (9th Cir. 1975).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VINCENT E. SULLIVAN

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EMSLIE LEANDER MOORE, *Defendant-Appellant.*	No. 74-2835
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. FLOYD MOORE, *Defendant-Appellant.*	No. 74-2150
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. PIETER CORNELIS PANNEKOEK, *Defendant-Appellant.*	No. 74-2268 OPINION

[June 19, 1975]

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS, Circuit Judge, RICH,* Judge, United States Court of Customs and Patent Appeals, and ELY, Circuit Judge.

ELY, Circuit Judge:

Each of the three appellants was indicted, along with alleged co-conspirators Charles Heckler and Frank Rezabek, for one count of conspiracy to steal, conceal, and sell United States Government property, in violation of 18 U.S.C. §§ 371 and 641. Appellant Emslie Leander Moore (hereinafter Lee Moore) was indicted on an additional count, charging the substantive offense of concealing stolen Government property, a violation of 18 U.S.C. § 641.

*Honorable Giles S. Rich, Associate Judge, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

Heckler's case was served from the others, and he was subsequently called as a witness for the prosecution. In a jury trial, appellants Floyd Moore and Pieter Pannekoek were convicted on the conspiracy count. The same jury failed to reach a verdict as to Frank Rezabek, and his case was scheduled for retrial. Appellant Lee Moore, who was physically unable to undergo the jury trial with his co-defendants, later waived his right to a trial by jury and proceeded to trial before the district judge. The Government submitted its case against Lee Moore on the transcript of the earlier jury trial, and the judge found Lee Moore guilty on both of the counts charged against him.[1]

Lee Moore was ordered imprisoned for five years on each of his two convictions, with the sentences to run concurrently, and fined in the total amount of $10,000. Floyd Moore was sentenced to imprisonment for two years, with all but six months suspended. Pannekoek was sentenced to imprisonment for two years and ordered to pay a $5,000 fine.

The facts of the cases against the appellants center around a scheme to steal new Government-owned hand tools from a self-service Naval supply facility, known as the "Serv-Mart," located at the North Island Naval Base, San Diego, California, and to sell those tools at a Los Angeles marketplace for wholesale tool dealers, known as the "Paramount Swap Meet." The conspiracy began approximately in 1971 when Heckler, the Serv-Mart's assistant manager, agreed to allow Lee Moore, at that time a Navy enlisted man, to make unauthorized exchanges of merchandise that Lee Moore had acquired elsewhere for new hand tools from the Serv-Mart. After these exchanges had continued for approximately four months, Lee Moore, with Heckler's assistance, began to remove tools from the Serv-Mart without providing anything in exchange. In consideration for his co-

[1]The three appeals herein considered were consolidated by Orders of this court.

operation, Heckler at all times received a percentage of the proceeds from the sales of the stolen or exchanged Serv-Mart tools. According to the Government's theory, appellants Floyd Moore and Pannekoek and co-defendant Rezabek participated in the theft scheme by receiving the stolen tools from Lee Moore, selling them at the Swap Meet, and returning at least a portion of the proceeds to Lee Moore.[2]

After the conspiracy was discovered in 1973, Naval supply officials inventoried the North Island Serv-Mart and discovered that the facility had suffered inventory losses of approximately $400,000 between February, 1972, and March, 1973.

I. *Lee Moore's Appeal*

Lee Moore's first three contentions on this appeal concern an affidavit filed by FBI Agent Reginato in support of applications for warrants to search Lee Moore's house and automobile. Acting on the basis of the affidavit, a magistrate issued the warrants, and FBI agents, executing the warrants, seized numerous new, Government hand tools that later were introduced into evidence against the appellants.

A substantial portion of the Reginato affidavit consists of recited facts assertedly reported to various FBI agents by a single, unnamed informer. Lee Moore first argues that the district judge erred in refusing his two motions for an order requiring the Government to reveal the informer's identity.

The Government sought to withhold the informer's identity because the informer had expressed fear for his safety should his identity become known. Lee Moore argued, on the other hand, that if the identity of the informer were revealed, and if the informer were the individual Moore thought him to be, the defendants would then be able to make an initial showing that there were substantial falsehoods in the Reginato affidavit. Such a showing would have entitled the defendants to an evidentiary hearing on the facts asserted in the affidavit. *United States v.*

[2]The proof indicated that in the first months of the conspiracy, Pannekoek sold the stolen goods at the Swap Meet but that in the later months, he was replaced by Floyd Moore and Rezabek.

Harris, 501 F.2d 1, 5-6 (1974); *United States v. Damitz*, 495 F.2d 50 (9th Cir. 1974); *see United States v. Bolton*, 458 F.2d 377, 378 n.6 (9th Cir. 1972).

Specifically, Lee Moore calls into question a portion of the Reginato affidavit which states that the informer reported to the FBI that on February 23 or 24, 1973, the informer observed numerous Government hand tools in Lee Moore's house and garage. Lee Moore's attorney filed his own affidavit with the court, in which he stated that his client believed the Government's informer to be one Wachhold, who had visited the Lee Moore residence on the specified dates, that he had interviewed Wachhold, and that Wachhold had said that he had not reported to the FBI that he had seen Government tools in the Moore residence. According to the attorney's affidavit, Wachhold also stated that he had not told the FBI that he feared for his safety if Lee Moore and the other alleged co-conspirators were to learn that he was the FBI's informer.

Initially, Lee Moore's argument presents the question whether the Supreme Court's holding in *Roviaro v. United States*, 353 U.S. 53 (1957), would require disclosure of an informer's identity if such disclosure would enable an accused to make a substantial showing of material falsehoods in an affidavit submitted in support of an application for a search warrant. We think it unnecessary to decide this question, however, since we hold that the trial judge correctly found, after conducting an *in camera* inquiry, that knowledge of the informer's identity would not enable Lee Moore to establish that there were substantial falsehoods in the Reginato affidavit.

Acting on the basis of the attorney's affidavit, the district judge conducted *in camera* interviews with certain FBI agents and the Government's true informer, during which he learned the informer's identity and inquired, insofar as he believed necessary, into the Government's reasons for secrecy and the bases for certain portions of the Reginato affidavit. In recent cases, our court has approved such *in camera* interviews for the purposes of determining whether law enforcement officers have justifiably trusted the conclusions drawn by an informer whose reliability has otherwise been established, *United States v. Anderson*, 509 F.2d 724, 727-30 (9th Cir. 1974), *cert. denied*,

1 5

—— U.S. ——, 95 S. Ct. 831 (1975); *United States v. Tutweiler*, 505 F.2d 758 (9th Cir. 1974), and whether knowledge of an informer's identity would be helpful to an accused's defense on the merits, *United States v. Rawlinson*, 487 F.2d 5 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). The *in camera* procedure provides an equally-acceptable accommodation of the competing interests of the Government and the accused in the situation presented here, wherein the question is whether a law enforcement officer has lied. Through disclosure of the informer's identity to the trial judge, and such subsequent inquiries by the judge as may be necessary, the Government can be protected from any significant, unnecessary impairment of necessary secrecy, yet the defendant can be saved from what could be serious police misconduct.[3] Having examined the sealed transcript of the *in camera* proceedings, we believe that the trial judge's conclusion, i.e., that knowledge of the informer's identity would not aid Moore in making the required showing, was correct.

Lee Moore next contends that there was ample other evidence of substantial misrepresentations in the Reginato affidavit to support his demand for an evidentiary hearing on the facts therein presented. Moore points out here, as he did in the trial court, that paragraph one of the affidavit states that the informer had provided reliable information to the FBI on *five* occasions in the past, while paragraph nine recites that the informer had provided reliable information on only *two* past occasions. Additionally, Lee Moore argues that certain language in the affidavit could lead a careful reader to the conclusion that a vehicle described in certain of the factual allegations in the affidavit was not the same vehicle for which a search warrant was sought. In our view, neither of these apparent inconsistencies in the language of the affidavit approaches the "substantial showing of falsehood" that is required. *United States v. Harris*, 501 F.2d 1, 5-6 (9th Cir. 1974).

[3] *See* Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. Ill. L.F. 405, 445-47; *cf.* Fed. R. Crim. P. 16(e); ABA Standards, Discovery and Procedure Before Trial §§ 2.6(b), 4.6 (1970); *Proposed* Fed. R. Ev. 510(c)(3) (not enacted by Congress).

Acting carefully to protect the defendant's rights, the district judge inquired into both of these alleged discrepancies during the *in camera* interviews discussed above. We emphasize that these *in camera* inquiries were not intended as, nor were they, substitutes for the evidentiary hearing to which the appellant would have been entitled had he made the threshold substantial showing of falsehood. Rather, the district judge conducted the *in camera* inquiries to assist him in determining whether the appellant had made the necessary initial showing. After the inquiries, the judge found that the required showing had not been made, and our study of the sealed transcripts of the *in camera* proceedings convinces us that the judge's conclusion was proper.

For his final point concerning the contested search and seizure, Lee Moore argues that the Reginato affidavit was, on its face, inadequate to establish probable cause and consequently, that the trial judge erred in denying the appellant's motions to suppress the seized tools as evidence. We disagree. The appellant's argument, which focuses on alleged inconsistencies in the language of the affidavit and supposed insufficient bases for certain of the facts therein reported, urges, in effect, that we read Agent Reginato's affidavit with an extremely critical eye. The law requires no such approach. Affidavits submitted by law enforcement officers to support applications for search warrants must be read in a common sense and realistic manner. *See, e.g., United States v. Harris*, 403 U.S. 573, 577-80 (1971). Read in that light, the Reginato affidavit establishes that the informer had given reliable information in the past and that his reports to FBI agents were based either on his personal observations or his personal purchases from the conspirators. These showings satisfy the twin tests of *Aguilar v. Texas*, 378 U.S. 108, 114-15 (1964). Moreover, the affidavit also sets forth a number of facts gathered independently by FBI agents that tend to corroborate the informer's statements. For example, the informer reported that he had seen certain of the conspirators selling Government tools at the Swap Meet and had, himself, purchased such tools from them. The affidavit recites that two FBI agents also purchased tools, marked with a unique Government symbol, from two of the alleged conspirators at the Swap Meet. *See Spinelli v. United States*, 393 U.S. 410, 415-16 (1969).

To complete the Government's showing, Reginato's affidavit relates information provided to the FBI by a named representative of a tool manufacturer concerning the unique identifying markings placed on Government tools and specific data reported by a named officer of the United States Navy concerning the inventory losses at the Serv-Mart. Even though these reports were hearsay, the magistrate was legally entitled to consider them in determining whether the affidavit established probable cause. *See, e.g., Jones v. United States,* 362 U.S. 257, 271 (1960). Finally the affidavit details results of the FBI's physical surveillance of various of the alleged conspirators and Lee Moore's van-type truck, for which one of the search warrants was sought, at the Serv-Mart, Lee Moore's residence, and the Swap Meet. Viewing the affidavit as a whole, we find that it provides adequate support for the magistrate's conclusion that probable cause existed to believe that hand tools, stolen from the Government, were being concealed in Lee Moore's house and garage.

As his next issue, Lee Moore contends that the evidence adduced at trial failed to prove the single conspiracy charged in the indictment but instead revealed that actually there were three small conspiracies participated in by (1) Lee Moore and Heckler, (2) Lee Moore and Pannekoek, and (3) Lee and Floyd Moore and Rezabek. The appellant argues that this alleged variance between the indictment and the proof requires reversal of his conspiracy conviction. Even if we were to find, however, that the appellant's interpretation of the evidence is correct, a question that we do not reach, he would be wholly unable to show, as he must, that he was prejudiced by the variance. *Berger v. United States,* 295 U.S. 78 (1935); *United States v. Baxter,* 492 F.2d 150, 160 (9th Cir. 1973), *cert. denied,* 416 U.S. 940 (1974). Under the appellant's own view of the evidence, he was a central figure in *each* of the alleged three smaller conspiracies. Consequently, unlike the situation presented in *Kotteakos v. United States,* 328 U.S. 750 (1946), upon which the appellant relies, he was not subjected to the danger that he might be convicted on the basis of evidence that related only to a conspiracy of which he was not a part.

Both of Lee Moore's two remaining contentions, which are that the Government failed to prove that the stolen tools were Government property and that there was a material variance between

the prosecution's offer of proof and the testimony ultimately given by one of the Government's witnesses, are, in our view, without substantial merit.

Lee Moore's convictions, on both counts, are affirmed.

IV. *Conclusion*

Recapitulating, our dispositions of these appeals are as follows:

United States v. Emslie Leander Moore, No. 74-2835, AFFIRMED on both counts.

United States v. Pieter Pannekoek, No. 74-2268. AFFIRMED.

United States v. Floyd Moore, No. 74-2150, REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 74-2835
Appellee,	)	
v.	)	O R D E R
EMSLIE LEANDER MOORE,	)	
Appellant.	)	

Before: CHAMBERS, Circuit Judge, RICH,* Judge, United States Court of Customs and Patent Appeals, and ELY, Circuit Judge.

The Appellant's Petition for Rehearing is denied.

FILED

AUG 25 1975

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

*Honorable Giles S. Rich, Associate Judge, United States Court of Customs and Patent Appeals, Washington, D. C., sitting by designation.

FPI-Sandstone
8-25-49-MM-4,291

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

Affiant, a Special Agent with the Federal Bureau of Investigation, being first duly sworn, deposes and states:

1. A confidential source who has provided reliable information on stolen government tools on more than five occasions in the past, advised Special Agent ROBBIN GRAY of the FBI that since March, 1972, EMSLIE LEANDER MOORE had been selling U. S. government hand tools and that he had purchased tools from MOORE on at least two occasions.

2. On September 27, 1972, Special Agent TED MILLER, Naval Investigative Service, Naval Air Station, North Island, advised Special Agent JAMES A. BOBBITT of the FBI that EMSLIE LEANDER MOORE, Navy Serial Number 249-48-1573, was assigned to Squadron VS-41, Naval Air Station, North Island, and had the rank of Petty Officer First Class.

3. Mr. ROBERT JUNKEL, Contract Administrator, Industrial Services, Snap-On Tools Corporation, 8028 28th Avenue, Kenosha, Wisconsin, advised Special Agent TOMMY E. CAUTHEN the following information:

All Snap-On Tools made for the United States government have stamped on the item itself, an identifying letter. This letter specifically is the letter "V" and indicates this item is sold only to the federal government. The item, regardless of whatever it would be, would have the letter "V" stamped thereon, and in addition to that, there would perhaps be other letters and a number. An example would be a number such as FV-081. This would indicate this as a socket. According to the cross reference of such an item, that standard item, which is issued to other agencies outside the federal government, the number would be F-081. It would not include the letter "V".

JUNKEL further advised that not one tool is produced in the standard line, which is marked with the letter "V". He

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stated that this letter is specifically marked for government items. He advised that there was nothing, to his knowledge, that a tool purchased by Snap-On Tools with a letter "V" stamped thereon, would go into stock, which had not been produced for the government. He pointed out that if stock had built up to such an extent, for an example, his 3164 stock of particular items, those items would be buried as a means of destroying them and they would not be sold on the market.

JUNKER stated that Snap-On Tools Corporation did not sell seconds or otherwise dispose of any tools which were produced for the government.

He did specifically point out all government items do have the letter "V" stamped thereon.

4. On March 8, 1973, JAMES L. CODE, Commander, U. S. Navy, Director of Inventory, Naval Supply Center, advised Special Agent JAMES A. BOBBITT that between the August, 1972, inventory and the January, 1973, inventory of the Serv-Mart Store at the Naval Air Station, North Island, there was a discrepancy between inventory receipts and authorized disbursements in excess of $100,000.

5. The same source referred to in Item Number One advised Special Agent GRAY that FLOYD MOORE, brother of EMSLIE LEANDER MOORE, and FRANK REZABEK have taken a number of government tools to the Paramount Swap Meet, 14711 South Paramount Boulevard, Paramount, California, and have sold these tools for EMSLIE LEANDER MOORE on Tuesday mornings. The source advised that he has personally observed FLOYD MOORE and FRANK REZABEK selling tools on numerous occasions.

6. On February 27, 1973, Special Agents PAUL H. BREEN and NORMAN C. OLSON of the FBI attended the Paramount Swap Meet, 14711 South Paramount Boulevard, Paramount, California, and purchased a 1/2" ratchet adapter, brand name Snap-On, marked SV-67, and a 3/8" ratchet, brand name Snap-On, marked FV-71, from FLOYD MOORE and FRANK REZABEK, in Row J-6 of this Swap Meet. Special Agents BREEN and OLSON also observed additional quantities of the above described tools in the selling space reserved for MOORE and REZABEK in Row J-6. There was a light green Ford Econoline Van bearing California temporary license 6668745 parked in this same parking space.

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7. On March 6, 1973, a confidential source advised Special Agent ROBERT GRAY that on that date he observed FLOYD MOORE and FRANK REZABEK at the Paramount Swap Meet selling government tools from a light green Ford Econoline Van with a California temporary license.

8. On March 1, 1973, Special Agent JAMES R. RUMPH observed a green Ford van with California temporary license parked in the front yard of 11517 Posthill Place, Lakeside, California.

9. On February 24, 1973, a confidential source, who has provided reliable information on theft of government property on two previous occasions, advised Special Agent JAMES A. BOBBITT that he had observed numerous government hand tools located in the living room and attached garage of the residence belonging to EMSLIE LEANDER MOORE at 11517 Posthill Place, Lakeside, California, on February 23 or 24, 1973.

10. On February 27, 1973, Special Agents JAMES A. BOBBITT and WILLIAM M. AYERS observed EMSLIE LEANDER MOORE in a 1973 green Ford pickup with camper shell. Special Agent AYERS observed that this vehicle had a base sticker for the Naval Air Station, North Island, Number 03060. On that same date, Special Agent JAMES R. RUMPH determined through Base Security at Naval Air Station, North Island, that this sticker 03060 was issued to EMSLIE MOORE for a 1973 Ford pickup.

11. On February 28, 1973, Special Agent ANDREW A. FERACO observed EMSLIE LEANDER MOORE arrive at the Serv-Mart, Naval Air Station, North Island, in a light green Ford van, displaying California license 11093H, and park the vehicle at the front of the Serv-Mart and enter the front door of the Serv-Mart. MOORE later exited through the front door of the Serv-Mart carrying two boxes that were approximately the size of a briefcase; one tan in color, the other having a dark lid and a white bottom.

12. On February 28, 1973, Special Agents JAMES A. BOBBITT and WILLIAM M. AYERS observed EMSLIE LEANDER MOORE driving a green Econoline Ford Van, license number 11093H, back to MOORE's working area at VS-41, where he parked the vehicle and walked toward the hanger area, carrying only the tan box. A check through the California Law Enforcement Telecommunications System with the Department of Motor Vehicles, Sacramento,

California, revealed that California license plate 1199EH [illegible] on a 1970 Ford [illegible] registered to [illegible] or MARIE CULLENTON MOORE, address 722 Hillary Court, Imperial Beach.

13. On February 21, 1973, Special Agents JAMES A. DOLPHIN and LAWRENCE F. VINICK observed that 11517 Porthill Place, Lakeside, California, was the first house located on Porthill Place. Porthill Place is the first road on the left after turning onto Porthill Road from California State Highway number 67. The dwelling could be further described as white frame with green trim and attached garage.

ALFRED A. REGINATO

Subscribed and sworn to before me
this 9th day of March, 1973.

[illegible]

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AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss.

I, MILLIE LEWIS, after first being duly sworn, depose and say:

That I am a citizen of the United States, over the age of eighteen (18) years of age, a resident of the County of San Diego, and not a party to this action;

That my business address is 530 "B" St., Suite 1330, San Diego, Ca. 92101

That I served three copies of the within Petition for Writ of Certiorari on counsel for Respondent by placing said copies in an envelope, postage prepaid, and addressed to:

Solicitor General
Department of Justice
Washington, D. C. 20530

and same deposited in the United States Mail at San Diego, California, on September 23, 1975.

Millie Lewis

Subscribed and Sworn to before me this 23rd day of September, 1975.

Sheila I. Holt
Notary Public in and for said County and State

OFFICIAL SEAL
SHEILA I. HOLT
NOTARY PUBLIC - CALIFORNIA
Principal Office, San Diego Co. Calif.
My Commission Exp. Feb. 13, 1979

Supreme Court, U. S.
FILED
DEC 13 1975
MICHAEL RODAK, JR., CLERK

No. 75-464

In the Supreme Court of the United States

OCTOBER TERM, 1975

EMSLIE LEANDER MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the affidavit supporting the search warrant was inadequate to establish probable cause and that the district court should have conducted an evidentiary hearing to explore his allegations that there were misrepresentations in the affidavit.

Following a jury-waived trial in the United States District Court for the Southern District of California, petitioner was convicted of concealment of stolen government property and of conspiracy to commit the substantive offense, in violation of 18 U.S.C. 371 and 641. He was sentenced to concurrent terms of five years' imprisonment on each count and was fined $10,000. The court of appeals affirmed in a thorough opinion upon which we rely (Pet. App. 14-17; 522 F. 2d 1068).

The evidence, which is summarized in the opinion of the court of appeals, showed that between 1971 and 1973 petitioner, then a Navy enlisted man, removed large quantities of new hand tools from a Navy supply facility. This venture had the cooperation of Charles Heckler, the facility's assistant manager. On March 9, 1973, agents of the Federal Bureau of Investigation executed a search warrant for petitioner's premises and for a Ford van owned by petitioner. Numerous government hand tools and various wrappings and tapes, later identified as the types of materials carried by or used at the facility, were seized (Tr. 323-327).[1] Several boxes and containers seized bore the notations of an employee of the facility (Tr. 323-327).

Prior to trial petitioner filed motions seeking disclosure of the identity of the informant referred to in the affidavit supporting the search warrant and seeking to suppress the evidence seized. Petitioner asserted that he believed the informant to be Glen Wachhold. If Wachhold was the informant, petitioner argued, he would be able to show that the affidavit contained a substantial misrepresentation of Wachhold's story (M. Tr. 14).

The district court conducted an *in camera* hearing, during which agents testified concerning the informant's identity, the basis for questioned portions of the affidavit, and the basis for the government's position that the informant's personal safety would be jeopardized if his identity were disclosed. The district court concluded that disclosure of the informant's identity would not be of benefit to petitioner (Pet. App. 15-16).

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[1] "Tr." and "M. Tr." refer respectively to the transcript of the proceedings at the trial of petitioner's co-defendants, which was submitted as evidence at petitioner's trial, and to the transcript of the proceedings on petitioner's pretrial motions.

1. The affidavit in support of the warrant stated that a confidential source who had provided reliable information on more than five prior occasions told Special Agent Robert Gray that petitioner had been stealing tools, some of which the informant had purchased (Pet. App. 19). The affidavit also stated that a confidential source "who ha[d] provided reliable information on theft of government property on two previous occasions" had told another agent that on February 23 or 24, 1973, he had observed government tools in petitioner's home and garage (Pet. App. 21). The affidavit recited that this informant and two agents had purchased tools from petitioner's confederates, that the informant had observed the conspirators selling such tools to others, and that each tool purchased by the agents bore a unique government symbol (Pet. App. 20-21).

Petitioner contends that this affidavit failed to establish probable cause because it did not state that the affiant had personal knowledge that the confidential source had furnished reliable information in the past, and because the affiant did not specify the circumstances under which the affiant had received the information. However, as the court of appeals noted (Pet. App. 16), the affidavit established "that the informer had given reliable information in the past and that his reports to FBI agents were based either on his personal observations or his personal purchases from the conspirators." The requirements of *Aguilar* v. *Texas*, 378 U.S. 108, 114-115, were thus satisfied.

Moreover, as the court of appeals observed, the affidavit also contained numerous independent facts, including those furnished by two agents, that corroborated the informant's statements. See *United States* v. *Harris*, 403 U.S. 573; *Spinelli* v. *United States*, 393 U.S. 410, 415-416. Petitioner's attempt to flyspeck the affidavit was properly rejected by the court of appeals; "[a] policeman's affidavit should not

be judged as an entry in an essay contest" (*Spinelli, supra,* 393 U.S. at 438; Fortas, J., dissenting).

2. Petitioner also contends that the district court should have held a hearing on his challenge to the truthfulness of the assertions in the affidavit because Wachhold—whom petitioner asserts was the informant—told petitioner's counsel a story different from the version of affairs recounted in the affidavit. However, as the court of appeals held, these allegations did not approach "the 'substantial showing of falsehood' that is required" (Pet. App. 16). The district court properly held an *in camera* hearing and concluded that an open hearing would not be of benefit to petitioner. The court of appeals examined the sealed transcript of the *in camera* hearing and approved the district court's decision (Pet. App. 16).

Petitioner contends that there is a conflict among the circuits concerning the effect of misrepresentations in an affidavit, and concerning the initial showing necessary to require a district court to hold a more thorough hearing. See *United States* v. *Belculfine,* 508 F. 2d 58 (C.A. 1) (collecting cases); *United States* v. *Dunnings,* 425 F. 2d 836, 840 (C.A. 2), certiorari denied, 397 U.S. 1002 (requiring an "initial showing of falsehood or other imposition on the magistrate"); *United States* v. *Carmichael,* 489 F. 2d 983, 988 (C.A. 7) (requiring an initial showing of a misrepresentation of a "material fact" or any intentional misrepresentation). Cf. *North Carolina* v. *Wrenn,* 417 U.S. 973 (White, J., dissenting from denial of certiorari). Although resolution of these conflicts eventually may be necessary in a case properly presenting one or both of the issues, this is not such a case. Here, not only was petitioner's initial "showing" of falsehood no more than speculation (and therefore insufficient under any standard), but also the district court held a hearing to inquire into the claimed falsehood and concluded that the disclosure

of the informant's identity would not be of aid to petitioner (Pet. App. 16).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.